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## MAK KHUIN WENG v. MELAWANGI SDN BHD

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
AB KARIM AB JALIL JCA
ASMABI MOHAMAD JCA
B [CIVIL APPEAL NO: B-02-2191-12-2014]
9 AUGUST 2016

***TORT:*** *Defamation – Libel – Cause of action in defamation against limited companies – Whether limited in nature – Whether elements to be proven more* C *onerous – Whether action may only arise for malicious falsehood – Whether company's action related to damage to trading reputation – Whether words complained of injuriously affected company – Whether element of public interest involved*

D The present appeal was against the decision of the trial judge in allowing an action for defamation by the respondent ('plaintiff'). The plaintiff's pleaded case against the appellant ('defendant') was that the defendant had published a defamatory statement against the plaintiff by way of a report entitled 'Report to The Amcorp Trade Centre JMC Case To The MBPJ Commissioner of Buildings'. The defendant contended that limited E companies' cause of action in defamation is limited in nature as opposed to an individual person and when it involves public corporation and/or governmental bodies and/or institution which deals with matters related to public then such corporation, bodies and/or institution cannot maintain an action for defamation. In essence, the defendant asserted that (i) the plaintiff F could not maintain an action for defamation in respect of the words which reflected solely upon its individual staff and not upon itself; and (ii) the staff was not the alter ego of the plaintiff.

**Held (allowing appeal with costs)**
**Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:**

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**(1)** When it relates to defamation relating to limited company, the elements which need to be proved to raise a sustainable cause of action becomes more onerous in contrast to defamation action against a living person. The cause of action has a specific meaning and legal obligation to be met with by the plaintiff, failing which the action will be non-productive. A H living person can sue and maintain a cause of action. This privilege is not accorded to public corporation and/or governmental bodies and/or institutions though they may have legal capacity to sue but will not have a cause of action in libel or slander. (paras 7 & 8)

I **(2)** Even though a corporation will not have a cause of action in defamation, it may have a cause of action for malicious falsehood, even though the libel or slander may not be defamatory. Malicious falsehood primarily protects property rights and the claimant must prove that the defendant

published the words knowing them to be false. A company can bring an action in respect of words that damage its trading reputation provided that they can prove the words complained of had injuriously affected the company. This element must be pleaded and proved. (paras 10-12)

**(3)** In order for a company to sue for libel or slander, the words complained of must injuriously affect the corporation or company as distinct from the individual which compose it. The injury relating to libel and slander must be in relation to its trading reputation which must relate to 'its pocket' and must not be related to misconduct of staff, etc. Further, if an element of public interest is involved, the criticism must be moderate and not malicious. The burden is on the company to proof the libel or slander had injuriously affected the company. This element must also be pleaded and proved. (para 18)

**(4)** The plaintiff had not satisfied the threshold requirement for limited company to maintain an action in libel. There was no finding by the trial judge that the words complained of had injuriously affected the company in relation to its pocket. Taking a holistic view of the pleadings, facts and the law as well as taking note that there were some elements of public interest involved in the instant case, the appeal was meritorious. (paras 21 & 22)

***Bahasa Malaysia*** *Headnotes*

Rayuan ini adalah terhadap keputusan hakim bicara membenarkan tindakan memfitnah oleh responden ('plaintif'). Kes plaintif yang diplid terhadap perayu ('defendan') adalah bahawa defendan menerbitkan kenyataan memfitnah terhadap plaintif melalui laporan yang bertajuk 'Report to The Amcorp Trade Centre JMC Case To The MBPJ Commissioner of Buildings'. Defendan menghujahkan bahawa kausa tindakan syarikat-syarikat berhad bagi fitnah adalah terhad berbanding dengan orang perseorangan dan apabila ia melibatkan perbadanan awam dan/atau badan-badan kerajaan dan/atau institusi yang menangani perkara-perkara berkaitan orang awam, maka perbadanan, badan-badan kerajaan dan/atau institusi tersebut tidak boleh mengekalkan tindakan memfitnah. Pada asasnya, defendan menyatakan bahawa (i) plaintif tidak boleh mengekalkan tindakan fitnah berkaitan dengan perkataan-perkataan yang menggambarkan semata-mata kakitangan individunya dan bukan terhadap dirinya; dan (ii) kakitangan tersebut bukan alter ego kepada plaintif.

**Diputuskan (membenarkan rayuan dengan kos)**
**Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:**

**(1)** Apabila berkait dengan fitnah yang melibatkan syarikat terhad, elemen-elemen yang perlu dibuktikan untuk membangkitkan kausa tindakan yang boleh dikekalkan menjadi lebih berat berbanding dengan tindakan fitnah terhadap orang perseorangan. Kausa tindakan tersebut

mempunyai maksud dan kewajipan undang-undang yang lebih spesifik untuk dibuktikan oleh plaintif, dan jika gagal, tindakan tersebut tidak boleh dikekalkan. Orang perseorangan boleh menyaman dan mengekalkan sesuatu kausa tindakan. Keistimewaan ini tidak berlanjut kepada perbadanan awam dan/atau badan-badan kerajaan dan/atau institusi-institusi walaupun ia mungkin mempunyai kapasiti untuk menyaman tetapi tidak mempunyai kausa tindakan dalam fitnah bertulis atau slander.

**(2)** Walaupun sesuatu perbadanan tidak akan mempunyai kausa tindakan dalam fitnah, ia boleh mempunyai kausa tindakan terhadap kepalsuan niat jahat, walaupun fitnah bertulis atau slander tersebut tidak bersifat memfitnah. Kepalsuan niat jahat secara asasnya melindungi hak-hak harta dan penuntut mesti membuktikan bahawa defendan menerbitkan perkataan-perkataan dengan pengetahuan bahawa ia adalah salah. Sesuatu syarikat boleh memulakan tindakan berkaitan perkataan-perkataan yang menjejaskan reputasinya jika ia boleh membuktikan bahawa perkataan-perkataan yang diadukan menjejaskan syarikat. Elemen ini mesti diplid dan dibuktikan.

**(3)** Bagi sesebuah syarikat menyaman terhadap fitnah bertulis atau slander, perkataan-perkataan yang diadukan mesti menjejaskan perbadanan atau syarikat berbeza dengan individu yang memulakannya. Kemudaratan berkaitan fitnah bertulis dan slander mestilah berkaitan dengan reputasi perniagaannya yang mesti melibatkan 'pendapatannya' dan bukan berkaitan dengan salah laku kakitangannya, dan lain-lain. Selanjutnya, jika elemen kepentingan awam terlibat, kritikan tersebut mesti sederhana dan tidak berniat jahat. Beban adalah pada syarikat untuk membuktikan fitnah bertulis atau slander menjejaskan syarikat. Elemen ini juga mesti diplid dan dibuktikan.

**(4)** Mahkamah tidak berpuas hati bahawa plaintif telah membuktikan keperluan ambang bagi syarikat persendirian mengekalkan tindakan bagi fitnah bertulis. Tiada dapatan oleh hakim bicara bahawa perkataan-perkataan yang diadukan menjejaskan syarikat berkaitan dengan pendapatannya. Dengan pendekatan holistik berkaitan pliding, fakta-fakta dan undang-undang dan mempertimbangkan bahawa terdapat elemen-elemen kepentingan awam yang terlibat dalam kes ini, rayuan ini adalah bermerit.

**Case(s) referred to:**

*Chew Peng Cheng v. Anthony Teo Tiao Gin [2008] 8 CLJ 418 HC* ***(refd)***
*D & L Caterers Ltd and Jackson v. D'Anjou [1945] KB 210* ***(refd)***
*Dato' Seri Diraja Hj Adnan Hj Yaakob v. Utusan Melayu [2015] 7 CLJ 960 HC* ***(refd)***
*Derbyshire County Council v. Times Newspapers Ltd & Others [1993] AC 534* ***(refd)***
*Government of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC* ***(refd)***

*Government of the State of Sarawak & Anor v. Chong Chieng Jen [2016] 5 CLJ 169 CA* ***(refd)***
*Hock Hua Bank Bhd v. Leong Yew Chin [1987] 1 CLJ 126; [1987] CLJ (Rep) 126 SC* ***(refd)***
*Jameel & Another v. Wall Street Journal Europe Sprl [2006] UKHL 44* ***(refd)***
*John Holland Group Pty Limited & Anor v. John Fair Fairfax Publications Pty Ltd & Anor [2006] ACTSC 34* ***(refd)***
*Kerajaan Negeri Terengganu & Ors v. Dr Syed Azman Syed Ahmad Nawawi & Ors [2013] 1 CLJ 107 HC* ***(refd)***
*Lewis v. Daily Telegraph Ltd [1963] 2 All ER 151* ***(refd)***
*Nasri v. Mesah [1970] 1 LNS 85 FC* ***(refd)***
*South Hetton Coal Company v. North Eastern News Association Limited [1894] 1 QB 133* ***(refd)***

**Legislation referred to:**
Building and Common Property (Maintenance and Management) Act 2007, s. 7
Defamation Act 1957, s. 6

Defamation Act 1952 [UK], s. 3

**Other source(s) referred to:**
*Bullen and Leake and Jacob's, Precedents of Pleadings,* 12th edn, pp 544, 624

*For the appellant - Karin Lim Ai Ching, Suppiah Arumugam & Christine Lim Hun Ni; M/s HN Lim & Co*
*For the respondent - Dhanaraj Vasudevan & Devandra Balasingam; M/s Kamil Hashim Raj & Lim*

*[Editor's note: Appeal from High Court, Shah Alam; Civil Suit No: 22-1980-2008 (overruled).]*

*Reported by S Barathi*

## JUDGMENT

**Hamid Sultan Abu Backer JCA:**

**[1]** The appellant/defendant appeals against the decision of the learned trial judge who allowed an action for defamation by the respondent/plaintiff.

**[2]** It was the appellant's contention that limited companies' (incorporated under the Companies Act 1965) cause of action in defamation is limited in nature as opposed to individual person's; and when it involves public corporation and/or Governmental bodies and/or institutions which deals with matters related to public then such corporation, bodies and/or institutions cannot maintain an action for defamation based on the House of Lords' decision in *Derbyshire County Council v. Times Newspapers Ltd & Others* [1993] AC 534.

**[3]** In essence, the appellant asserts that: (i) the respondent cannot maintain an action for defamation in respect of the words which reflect solely upon its individual staff and not upon itself; (ii) further, the staff was not the

A alter ego of the respondent. The appellant in anchoring the argument relied, *inter alia,* on the following cases, namely: (i) *John Holland Group Pty Limited & Anor v. John Fair Fairfax Publications Pty Ltd & Anor* [2006] ACTSC 34; (ii) *Kerajaan Negeri Terengganu & Ors v. Dr Syed Azman Syed Ahmad Nawawi & Ors* [2013] 1 CLJ 107; (iii) *Dato' Seri Diraja Hj Adnan Hj Yaakob v. Utusan*
B *Melayu* [2015] 7 CLJ 960; (iv) *Government of the State of Sarawak & Anor v. Chong Chieng Jen* [2016] 5 CLJ 169 (Q-01-210-06-2014; etc. in particular the judgment of His Lordship David Wong Dak Wah JCA.

**[4]** In short, the appellant attempts to make a distinction that: (i) the parameters of libel for person and that of a company is not one and the same
C in relation to the cause of action; (ii) when it relates to public corporation and/or Government bodies and/or institutions, there cannot be a cause of action in tort even though they may in law have *locus* to sue; (iii) a limited company also will have *locus* to sue but only on limited parameters and it may have a cause of action. The memorandum of appeal, *inter alia,* reads as
D follows:

> 1. Yang Arif Hakim telah terkhilaf di sisi undang-undang dan fakta apabila membenarkan tuntutan Responden terhadap Perayu.
>
> 2. Yang Arif Hakim telah terkhilaf di sisi undang-undang dan fakta apabila gagal memutuskan bahawa kenyataan berkenaan dengan tuduhan
> E bahawa kakitangan Responden telah memberi kontrak pengiklanan kepada seorang kakitangan lain telah merujuk kepada kakitangan-kakitangan Responden dan bukan Responden dan oleh yang demikian tiada kausa tindakan oleh Responden terhadap Perayu.
>
> 3. Yang Arif Hakim telah terkhilaf di sisi undang-undang dan fakta apabila
> F gagal memutuskan bahawa hanya kakitangan-kakitangan Responden yang dirujuk dalam kenyataan berkenaan mempunyai kausa tindakan (sekiranya ada) terhadap Perayu.
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> 4. Yang Arif Hakim telah terkhilaf di sisi undang-undang dan fakta apabila gagal memutuskan bahawa kenyataan berkenaan dengan kerugian besar
> G yang dialami oleh Responden tidak munasabah dan bahawa sebuah firma akauntan antarabangsa harus dilantik tidak merupakan fitnah.
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> 5. Yang Arif Hakim telah terkhilaf di sisi undang-undang dan fakta apabila gagal memutuskan bahawa Perayu sebagai kaunselor Dewan Bandaraya Petaling Jaya hanya membuat satu pengesoran di bawah Building and Common Property (Maintenance and Management) Act 2007 dan oleh
> H yang demikian laporan yang dibuat oleh Perayu tidak merupakan fitnah.
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> 6. Yang Arif Hakim telah terkhilaf di sisi undang-undang dan fakta apabila gagal memutuskan bahawa laporan yang dibuat oleh Perayu dilindungi oleh perlindungan bersyarat.
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> 7. Yang Arif Hakim telah terkhilaf di sisi undang-undang dan fakta apabila
> I gagal memutuskan bahawa Responden telah gagal membuktikan niat jahat oleh Perayu.

8. Yang Arif Hakim telah terkhilaf di sisi undang-undang dan fakta apabila gagal memutuskan bahawa kenyataan dalam laporan tersebut tidak merupakan fitnah kerana laporan tersebut telah dimasukkan dalam Bahagian A, Ikatan Dokumen Bersama.

**[5]** To appreciate the appellant's argument, one must be appraised of the elements relating to the tort of defamation as well as malicious falsehood. It is only upon such comparison that the arguments here can be appreciated in the right perspective. For example, it may be difficult for many students or jurists to define hearsay evidence, but will become easy to define if they are first allowed to define direct evidence.

**[6]** We heard the appeal on 3 May 2016 and invited further written submission confined to the area of tort relating to injury in consequence of libel, etc. to a body corporate. Injury by tortious action to body corporate, etc. may attract the jurisprudence relating to malicious falsehood.

**Jurisprudence Relating To Corporation In Respect Of Libel, Slander, Malicious Falsehood And The Distinction Between Right To Sue And Cause Of Action**

**[7]** Defamation is a generic word and it consists of libel and slander, provided it satisfies the requirement developed by case laws. What may amount to libel or slander in a particular instance may be nefarious and the views of the High Court, Court of Appeal and/or the Federal Court may not be one and the same, in relation to libel or slander in the same case. What is important to note in defamation is that all the required elements to prove the elements of the tort which must be pleaded, must be established at the stage of plaintiff's case itself to have a viable cause of action in defamation. Only upon the elements having been established and/or proved that the defendant's obligation to demonstrate the viable defence to defamation action will arise. What is also important to appreciate when it relates to defamation relating to limited company is that the elements which need to be proved to raise a sustainable cause of action become more onerous in contrast to defamation action against a living person. Cause of action has a specific meaning and legal obligation to be met with by the plaintiff, failing which the action will be non-productive. Learned authors of *Janab's Key To Civil Procedure*, 5th edn (2012) on cause of action which is relevant to the instant case, has this to say:

'Cause of action' means the cause or the set of circumstances which leads up to an action in court. The term refers to every fact, which is necessary for the plaintiff to prove in order to entitle him to an order or judgment in an action. It does not however include every piece of evidence which is necessary to prove each fact, but only every fact, which is necessary to be proved to entitle the plaintiff to an order or judgment in an action. It is in other words a bundle of essential facts, which was necessary for the plaintiff to prove before he can succeed in an action. The cause of action

A is a condition precedent to the commencement of an action and every claim must disclose a cause of action before the court will be able to proceed to adjudicate the dispute. If there is no cause of action the court cannot provide any remedy.

(See *Government of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ B 219; [1988] 1 CLJ (Rep) 63; [1988] 2 MLJ 12; *Hock Hua Bank Bhd v. Leong Yew Chin* [1987] 1 CLJ 126; [1987] CLJ (Rep) 126; [1987] 1 MLJ 230; *Nasri v. Mesah* [1970] 1 LNS 85; [1971] 1 MLJ 32).

**[8]** What is trite in law of defamation is that a living person can sue and maintain a cause of action. This privilege is not accorded to public C corporation and/or Governmental bodies and/or institutions though they may have legal capacity to sue but will not have a cause of action in libel or slander, though they may have a cause of action for malicious (injurious) falsehood. The House of Lords in *Derbyshire*' case on the tort of malicious falsehood to say body corporate will have a right to maintain an action as D opposed to defamation without much deliberation, had this to say at p. 551 of the judgment which reads as follows:

> That must certainly be true considering that in the past hundred years there are only two known instances of a defamation action by a local authority. He considered that the right to sue for malicious falsehood E gave such a body all the protection which was necessary.

**[9]** What is malicious falsehood or injurious falsehood then? Does it cover defamation? Learned authors of *Bullen and Leake and Jacob's, Precedents of Pleadings* 12th edn at p. 544 on malicious falsehood says:

> F Right of action. An action will lie for written or oral falsehoods not actionable *per se* nor even defamatory where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage (see *Ratcliffe v. Evans* [1892] 2 Q.B. 524, per Bowen L.J. at 527). To support this action the plaintiff must allege and prove (1) that the statement complained of was false, (2) that it was made maliciously, i.e. without just cause or excuse, G and (3) that the plaintiff has suffered actual damage, or, in cases under section 3 of the Defamation Act 1952, that it was calculated to cause pecuniary damage. (See *Alcott v. Millar's Karri & Co.* (1905) 91 L.T. 722).
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> By the Defamation Act 1952, s. 3(1), "In an action for slander of title, slander of goods or other malicious falsehood, it shall not be necessary H to allege or prove special damage:
>
> (a) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form; or
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> I (b) if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by him at the time of the publication.

**[10]** Malicious falsehood primarily protects **property rights**. Defamation **protects reputation** and the purpose of the award is to vindicate the claimant's reputation and compensate him for the injury to his feelings (emphasis added). In defamation, there is no obligation to prove malice and the statement is presumed to be false, and it is up to the defendant to prove it to be true. In malicious falsehood, the claimant must prove that the defendant published the words knowing them to be false.

**[11]** A company can bring an action in respect of words that damage its **trading reputation provided they can prove the words complained of injuriously affect the company**. (*Jameel and another v. Wall Street Journal Europe SPRL* [2006] UKHL 44). This element must be pleaded and proved. (emphasis added).

**[12]** Section 6 of the Defamation Act 1957 (Malaysia), covers malicious falsehood which is similar to s. 3 of the English Defamation 1952 which has been set out above. That is to say, even though a corporation will not have a cause of action in defamation, it may have a cause of action for malicious falsehood even though the libel or slander may not be defamatory. To put it in another way, it can be said that malicious falsehood may include libel and slander. *That is to say, the corporation is placed in a privilege position at common law to sue for malicious falsehood which is wider than defamation but the difference is in the burden of proof and in consequence, malicious falsehood is not resorted to as the burden of proof lies with the plaintiff as opposed to defamation where it will be sufficient if the plaintiff on the face of the publication is able to satisfy the court that the words are defamatory of the plaintiff* (emphasis added). (See *Chew Peng Cheng v. Anthony Teo Tiao Gin* [2008] 8 CLJ 418). Thus, it is wrong to assume that a corporation will not have relief in law when it is injured. To succeed the corporation must plead and proof as set out earlier from the citation of *Bullen and Leake*.

**[13]** Having said the above for corporation, the common law recognise that a limited company may sue for libel (*South Hetton Coal Company v. North Eastern News* [1894] 1 QB 133) or a slander (*D & L Caterers Ltd and Jackson v. D'Anjou* (1945) KB 210, 364) calculated to injure its reputation in the way of its business (trading reputation) without proof of special damage. (See *Bullen and Leake and Jacob*'s, 12th edn., p. 624). The position is given recognition under s. 6 of the Defamation Act 1957 which essentially is related to malicious falsehood but the burden of proof of special damage is not a requirement. **However, the other requirement of proof under the common law has not been clearly dispensed with** (emphasis added).

**[14]** The case of *South Hetton* [1894] as well as *D & L Caterers Ltd* [1945] mentioned earlier, were cases before the English Defamation Act 1952. The reading of those cases will show the parameters that the court has to deal

with, is not one and the same for libel or slander relating to a living person and some of the elements suggested originate from the elements related to malicious falsehood. Lord Holfmann in *Jameel & Another v. Wall Street Journal Europe Sprl* [2006] UKHL 44, on this point had this to say:

> [91] In the case of an individual, his reputation is a part of his personality, the 'immortal part' of himself and it is right that he should be entitled to vindicate his reputation and receive compensation for a slur upon it without proof of financial loss. But a commercial company has no soul and its reputation is no more than a commercial asset, something attached to its trading name which brings in customers. **I see no reason why the rule which requires proof of damage to commercial assets in other torts, such as malicious falsehood, should not also apply to defamation**. (emphasis added).

**[15]** This point is simplified and well-reflected in the headnotes to the case of *South Hetton* [1894] which reads as follows:

> Although a corporation or company cannot maintain an action for libel in respect of anything reflecting on its members personally, *yet it can maintain an action for a libel reflecting on the management of its trade or business and injuriously affecting the corporation or company as distinct from the individuals which compose it. The words complained of must attack the corporation or company in the method of conducting its affairs, must accuse it of fraud or mismanagement, or must attack its financial position. To maintain an action the corporation or company need not prove special damage* (emphasis added).
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> Where to an action for libel the defence of fair comment on a matter of public interest is pleaded the question whether the matter commented on is one of public interest is for the judge, and, the judge having held that there is some evidence that the comment is unfair, the question whether it is in fact unfair is for the jury. In deciding that question the jury must not dwell too much on isolated passages, but must consider the words complained of as a whole. If there are such deviations from absolute accuracy as to make the comment unfair, they must find for the plaintiff, but if there are no such deviations, or the deviation is minute and within the latitude of fair discussion and the region of that diversity of opinion which may be fairly and reasonably entertained by different persons on the same subject-matter, they should find for the defendant.
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> In an action for libel damage is presumed and the plaintiff need not prove any particular damage. The damages are at large, and the jury can give such damages as they think right having regard to the conduct of the parties and all the circumstances of the case.

**[16]** The headnotes are borne out of the decision of Lord Esher MR which reads as follows:

> I have thought out for myself the questions of law in this case, and I have come to the conclusion that the law of libel is the same as regards all manner of parties, and that the question is always the same, namely, whether the jury are of opinion that the matter published would, with

regard to the conduct of the plaintiff, lead persons of ordinary sense to look upon the plaintiff with hatred, contempt, or ridicule. That is always the question, whether the plaintiff is an individual, a firm, or a corporation. The application of that law is different, according to the different kinds of plaintiffs. There are some kinds of plaintiffs about whom things may be written which may lead ordinary people to entertain feelings of hatred, contempt, or ridicule, but there are other kinds of plaintiffs as to whom those same things could not lead people to entertain such feelings. For instance, if a man said that the manners of the plaintiff were grossly contrary to all proper sense of decency, that might lead ordinary people to entertain feelings of hatred, contempt, or ridicule towards him; but if the same thing was said as to the manners of a firm, or of a corporation, a firm or corporation cannot have manners, and in such a case, although the law is the same, the necessary conditions are wanting and the matter published is not a libel, because it could not lead to feelings of hatred, contempt, or ridicule towards a firm or corporation.

There are, however, other things which may be said as to the conduct of the plaintiff, when the plaintiff is a firm or corporation, which may be libellous. For instance, if you say of a man engaged in business that he conducts his business like a foolish man that is a libel upon him pounds his business, that is, upon him in respect of his conduct in his business. With respect to such a man, if you only say that his goods are bad, it is for the jury to consider whether this was so said as to imply that his conduct in his business was bad. For instance, if the plaintiff in a wine merchant and you say that there is a bad vintage, and the wine of that vintage is bad with him and with all merchants, that is no reflection upon the plaintiff in his business, but is only a reflection upon the goods, and is not a libel upon the plaintiff. If such a statement as that is made maliciously, and does injure the plaintiff, it only gives rise to an action upon the case, and not to an action for libel. If you say of a wine merchant that he has been selecting bad wine, that is a reflection upon him in his business, and may be a libel upon him in his business. In such a case the jury would have to say what was meant, and, if they find that the statement reflected upon the goods only, there is no libel; but, if they find otherwise, there is a libel.

**[17]** In *Lewis v. Daily Telegraph Ltd* [1963] 2 All ER 151 at 262, Lord Reid pointed out that a company cannot be injured in its feelings but only in its pocket. Lord Hope in *Jameel & Another v. Wall Street Journal Europe Sprl* [2006] UKHL 44, on this point had this to say:

[95] It is obvious, of course, that a trading company has no feelings which are capable of being injured. Trade is its business, and it is injury to its reputation in regard to its trade that is of the essence in its case. Lord Reid's comment in *Lewis v Daily Telegraph Ltd, Lewis v Associated Newspapers Ltd* [1963] 2 All ER 151 at 156, [1964] AC 234 at 262 that it can only be injured in its pocket captures the way in which the principle of the law of libel applies in its case. This does not mean, however, that it can only be injured in a way that gives rise to loss which, because it

A can be calculated, has the character of special damage. **What it means is that it must show that it is liable to be damaged in a way that affects its business as a trading company**. (emphasis added).

**[18]** In short, the injury relating to libel and slander must be in relation to its trading reputation which will be in the words of Lord Reid must relate B to 'its pocket' and must not be related to misconduct of staff, etc. in relation to this case. Further, if an element of public interest is involved the criticism must be moderate and not malicious. In addition, as per Lopez LJ in the said judgment, **the words complained of, in order for a company to sue for libel or slander, must injuriously affect the corporation or company as distinct** C **from the individual which compose it** (emphasis added). That is to say the burden is on the company to proof the libel or slander injuriously affects the company. This element of proof is not a requirement in a libel or slander action by an individual person. This element must also be pleaded and proved. This is also not a requirement when it relates to individual person. D His Lordship Lopez LJ observed:

> I do not propose to go into the facts of the case at length, but shall state my view of the law on the questions raised. It is not contended that the words complained of are not *prima facie* defamatory. Three questions arise: (i) Will the action lie by the plaintiffs who are a corporation? (ii) Is the matter commented on one of public interest? (iii) Is the comment E complained of fair and *bona fide*?
>
> With regard to the first point I am of opinion that, although a corporation cannot maintain an action for libel in respect of anything reflecting upon them personally, yet they can maintain an action for a libel reflecting on the management of their trade or business, and this without alleging or F proving special damage. The words complained of, in order to entitle a corporation or company to sue for libel or slander, must injuriously affect the corporation or company as distinct from the individuals which compose it. A corporation or company could not sue in respect of a charge of murder, or incest, or adultery, because it could not commit those crimes. Nor could it sue in respect of a charge of corruption, or for an G assault, because a corporation cannot be guilty of corruption or of an assault, although the individuals composing it may be. The words complained of must attack the corporation or company in the method of conducting its affairs, must accuse it of fraud or mismanagement, or must attack its financial position. Can it be contended that, if words are written attributing to a banking company insolvency, an action will not lie, and H that without alleging or proving special damage?

**[19]** Thus, it can be concluded that: (i) *locus* to sue cannot be equated to a cause of action; (ii) cause of action for libel or slander by a limited company is restricted in nature to trading reputation; (iii) the limited company as I plaintiff must plead and proof as set out in the *South Hetton* case which we have highlighted earlier though there is no requirement to prove any particular damage. Lord Esher in *South Hetton* case had this to say:

Then, if the case be one of libel-whether on a person, a firm, or a company-the law is that damages are at large. It is not necessary to prove any particular damage; the jury may give such damages as they think fit, having regard to the conduct of the parties respectively, and all the circumstances of the case.

**Brief Facts**

**[20]** The facts of the case has been summarised by the appellant as follows:

(a) The plaintiff was involved in developing a commercial property. The defendant was at the material time councillor of MBPJ and it is the pleaded case of the plaintiff that he represents Datuk Bandar.

(b) An AGM was held by the plaintiff on 8 April 2008 pursuant to the Building and Common Property (Maintenance and Management) Act 2007 ("the 2007 Act"). Some candidates who stood for election were unsuccessful as they failed to obtain the top 12 votes. One of the unsuccessful candidates is Yeo Ing King.

(c) On 26 April 2008, MBPJ issued a certificate of establishment to the JMC pursuant to s. 7 of the 2007 Act. After the said AGM and the issuance of the certificate of establishment, the unsuccessful candidates attempted to requisition an EGM. When they failed in their requisition for an EGM, they made a direct complaint to MBPJ and to the Commissioner of Buildings ("COB"). As a result, on 8 September 2008 the COB sent a notice by fax to the plaintiff requesting it to attend a meeting on 10 September 2008. On 9 September 2008, the plaintiff wrote to MBPJ to postpone and reschedule the meeting.

(d) On 30 September 2008, the plaintiff received a reply from MBPJ requesting a meeting with the plaintiff to clarify on the issues raised in the complaints from the residents.

(e) The meeting was held on 10 September 2008 attended by the unsuccessful candidates. The plaintiff's request to reschedule the meeting to another date was not known by the defendant who chaired the meeting. On 23 September 2008, a decision was made in favour of the unsuccessful candidate named Yeo Ing King to call for an EGM on 19 October 2008.

(f) On 25 September 2008, the plaintiffs CEO (also PW1 in the trial) wrote and also met with the Datuk Bandar to request that the plaintiff be given an opportunity to clarify the said complaints. Following the said meeting, two letters were issued by MBPJ on 30 September 2008 to inform the plaintiff that another meeting will be held to hear the plaintiff's clarification and comments on 7 October 2008. In that letter, the MBPJ had stated that the instruction to hold the EGM will not be revoked and that the EGM will be held on 19 October 2008 as scheduled. On 5 October 2008, Yeo Ing King proceeded to advertise about the EGM.

(g) On 7 October 2008, the COB conducted a meeting chaired by the defendant, who represented the Datuk Bandar together with MBPJ officers, JMC representatives and ATCOTA (Amcorp Trade Centre Owners & Tenants Association) representatives and by PW1 on behalf of the plaintiff.

(h) At that meeting, at the request of PW1, a copy of the report entitled "Report On The Amcorp Trade Centre JMC Case To The MBPJ Commissioner of Buildings" ("the said Report") which had been prepared by the defendant prior to the said meeting, was given to PW1 at his request.

(i) In para. 7 of its amended statement of claim, the plaintiff has pleaded that the defendant is a councillor of MBPJ and represents the Datuk Bandar.

(j) The plaintiff's pleaded case against the defendant is that the defendant has published defamatory statements against the plaintiff by way of a report entitled "report on The Amcorp Trade Centre JMC Case To The MBPJ Commissioner of Buildings".

(k) Impugned defamatory statements:

The plaintiff has pleaded in para. 11 of its amended statement of claim that the following statements contained in the said report are defamatory of it:

(a) At p. 249, para. 3 of the said report:

> Issue 2: Advertising Contract Awarded to Staff
>
> While this is not under the purview of the Commission of Buildings, the evidence presented shows a disturbing case where a staff of Melawangi Sdn. Bhd gave an advertising contract to another staff of Melawangi Sdn. Bhd.
>
> I believe that there is an element of misconduct and suggest that the purchasers file a police report on the matter.

(b) At p. 249, para. 9 of the said report:

> Such a huge loss accumulated over the years cannot be reasonable, as any normal company suffering such losses would have folded. It is therefore recommended that the developer appoints and pay for an international auditor firm to vet through the accounts, as provided for under Section 17(3) of the Act.

(l) In para. 16 of the amended statement of claim the plaintiff has pleaded that the words as stated in para. 3.3 above in their natural and ordinary meaning meant that the plaintiff is insincere and cannot be trusted; that

it carries on business in bad and inefficient manner; that it uses its power unscrupulously; that its honesty, credibility and background is doubtful. In para. 12, the plaintiff has further and in the alternative has pleaded that the impugned words referred to it the meaning attributed above by way of innuendo.

**[21]** We have read the appeal record and the submission of learned counsel. We take the view that the appeal must be allowed. Our reasons, *inter alia,* are as follows:

(a) For a limited company to succeed in libel, it must plead and prove the words complained of injuriously affect the company. It is not sufficient to rely on an innuendo as set out in para. 16 of the statement of claim when the complaint of misconduct is clearly related to the staff of Melawangi Sdn Bhd;

(b) Innuendo plays a lesser role in defamation suit filed by a limited company when the burden of proof rests with the plaintiff to prove it injuriously affect them as set out in *South Hetton* case. *South Hetton* case was dealt by the House of Lords in great detail in *Jameel & Another v. Wall Street Journal Europe Sprl* [2006] UKHL 44. Lord Hope at pp. 32 and 34 had this to say:

> [93] This issue has been referred to as 'the presumption of damage' issue. But to describe the award of damages for libel as based on a presumption is not wholly accurate. The question in every case of libel is whether the statement complained of would tend to bring the claimant into contempt, hatred or ridicule, or to injure his character: *South Hetton Coal Co Ltd v. North-Eastern News Association Ltd* [1894] 1 QB 133 at 138, [1891-4] All ER Rep 548 at 550 per Lord Esher MR. This is a question of fact. It is the injury to the claimant's feelings or to his reputation that makes the false statement libellous. The award flows from the fact that, in the case of an individual, an injury to feelings or to reputation will always sound in damages. In the same case ([1894] 1 QB 133 at 145, [1891-4] All ER Rep 548 at 553) Kay LJ said one of the differences between libel and slander is that in an action for libel, generally speaking, damage is presumed and that special damage need not be proved or alleged. But it is the fact that the statement was calculated to injure the claimant in his character or reputation that makes the action maintainable. Proof that he has a reputation that is capable of being injured in this way is an essential element. **In the case of an individual it can be presumed that he has a reputation of that kind. In all other cases this is something that must be proved**. (emphasis added).

(c) We have perused the pleadings and notes of evidence several times and were not satisfied that the plaintiff has satisfied the threshold requirement for limited company to maintain an action in libel as propounded by *South Hetton* case which we have stated earlier. There

A was no finding by the learned trial judge that the plaintiff had proved that the words complained of injuriously affect the company in relation to its pocket. The jurisprudence throughout the judgment advocated by the learned trial judge leans towards feelings which are only relevant to libel action by individual persons.

B (d) The learned trial judge's lengthy judgment relates to general libel suit relating to individual person, without making an attempt to satisfy the elements stated in *South Hetton* case in respect of limited company. In consequence, the judgment suffers from grave error of law which in our considered view, has compromised the integrity of the decision making
C process and ought to be set aside at *limine*.

**[22]** In addition, taking a holistic view of the pleadings, facts and the law as well as taking note that there are some elements of public interest involved in the instant case, we take the view that the appeal has merits.

D **[23]** For reasons stated above, the appeal is allowed with costs of RM45,000 for here and below to the appellant subject to allocatur. The judgment of the High Court is set aside. Deposit is to be refunded.

We hereby order so.

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